(2)

Supreme Court, U.S.
FILED
APR 1 1998
CLERK

No. 97-1431

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

COLIN LINDSAY, Executor of the Estate of Pedro Sosa, Deceased, - - - *Petitioner,*

versus

JEFFERSON COUNTY and JEFFERSON COUNTY DEPARTMENT OF CORRECTIONS, - - - - - *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUZANNE D. CORDERY
Assistant Jefferson County Attorney
Jefferson County Department of Corrections
730 W. Main Street, Suite 300
Louisville, Kentucky 40202
Telephone: (502) 574-2167
Fascimile: (502) 574-2184
Counsel of Record

April 1, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

16 pp

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1– 5
REASONS FOR DENYING THE WRIT	6–12
I. THE SIXTH CIRCUIT'S RELIANCE UPON *BROWN* DOES NOT RESULT IN A DECISION CREATING A MUNICIPAL LIABILITY STANDARD IN CONFLICT WITH THIS COURT'S DECISIONS IN *MONELL, TUTTLE, CANTON,* AND *BROWN.*	6–12
A. The Standard and Principles of Municipal Liability as Developed in the *Monell, Tuttle,* and *Canton* Decisions and Applied in *Brown.*	6– 9
B. The *Brown* Decision.	9–10
C. Application of the Standard of Municipal Liability Set Forth in *Monell, Tuttle, Canton,* and *Brown* to This Case.	10–12
II. THE ISSUANCE OF A WRIT OF CERTIORARI MERELY TO REEXAMINE THE DOCTRINE OF RESPONDEAT SUPERIOR IS NOT APPROPRIATE IN THIS CASE.	12
CONCLUSION	13

TABLE OF AUTHORITIES

PAGE

Cases:

Board of County Commissioners of Bryan County, Oklahoma v. *Brown*, 520 U.S. ____, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) ..... *passim*

City of Canton, Ohio v. *Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) ..... *passim*

Doe v. *Clairborne County, Tennessee*, 103 F.3d 495 (6th Cir. 1996) 7

Franklin County v. *Malone*, Ky., 957 S.W.2d 195 (1997) 12

Monell v. *New York Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 611 (1978) ..... *passim*

Oklahoma City v. *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) ..... *passim*

Pembaur v. *Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) 9

Statutes:

42 U.S.C. §1983 ..... 1, 6

Ky. Rev. Stat. Ann. §65.2005 12

Ky. Rev. Stat. Ann. §67B.050 2

Ky. Rev. Stat. Ann. §67B.130(1) 2

Ky. Rev. Stat. Ann. §441.005(1) 2

Ky. Rev. Stat. Ann. §441.025 2

No. 97-1431

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1997

COLIN LINDSAY, Executor of the Estate of Pedro Sosa, Deceased, - - - - - - *Petitioner,*

versus

JEFFERSON COUNTY and JEFFERSON COUNTY DEPARTMENT OF CORRECTIONS, - - - - - - - - *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner filed a Complaint under 42 U.S.C. §1983 in which he alleged his Constitutional rights were violated because he was strip-searched[1] and subjected to cruel and

---

[1] On page 4 of his STATEMENT OF THE CASE, Petitioner discusses matters recorded by a Jefferson County Jail videotape which recorded Sosa's demeanor upon his initial entry into the jail, where he was frisk searched and his personal property was taken. Although Petitioner still maintains Sosa was mistreated

(Continued on next page)

unusual punishments while incarcerated in the Jefferson County Jail on a criminal charge of public intoxication.[2] The Jefferson County Jail, located in Louisville, Jefferson County, Kentucky, is a facility maintained by the Jefferson County Department of Corrections, a *de jure* department and division of Jefferson County government, with its powers and duties subject to the approval of the Fiscal Court of Jefferson County.[3]

Petitioner's theory of municipal liability against the County was that the County and Department had a policy or custom of condoning, tacitly approving, or acquiescing in staff abuse of inmates which was systematically applied to inmates who are Puerto Rican, who speak with accents,

---

(Continued from preceding page)

during the frisk search, to avoid confusion of the facts relating to the issues presented in the petition, the three corrections officers who handled Sosa during this initial entry were absolved of the Fourth Amendment strip search claim after the first trial. R.64 Partial Verdict; R.65 Judgment. After Petitioner was again permitted to retry these facts at a second trial under the Eighth Amendment, a jury again found in favor of these three officers. R.85 Verdict; R.87 Judgment. Petitioner did not appeal from the final judgment in favor of these three officers.

[2] On pages 3 and 4 of his STATEMENT OF THE CASE, Petitioner discusses at some length his version of the circumstances leading to Sosa's arrest for public intoxication. To avoid confusion of the facts related to the issues presented in the petition, the arresting officer was a police officer employed by the City of Louisville, not a corrections officer employed by Jefferson County. R.106 A. Bybee at 2/28/96 TR 87. Neither the city police officer nor the City of Louisville was ever named as a defendant in the action. Further, the Jefferson County Department of Corrections is charged by law with the responsibility of confining those persons arrested and charged with criminal offenses and has no authority to second-guess the validity of the criminal charge. Ky. Rev. Stat. Ann. §441.005(1) and §441.025.

[3] Ky. Rev. Stat. Ann. §67B.130(1), §67B.050.

and who are homosexual or have AIDS. R.1 Complaint; Appellee's Sixth Circuit Brief.

At trial, Respondents sharply disputed Petitioner's version of the incident, with evidence that Sosa was intoxicated and argumentative upon his entry into the jail, was placed in a holding cell containing no toilet, sink or bench upon which an intoxicated, disruptive inmate might harm himself, and was eventually moved to another cell and restrained to a bench after he continually refused to stop banging on the metal door. Respondents disagree with Petitioner's description of how Sosa was restrained to the bench, as contained on page 5 of his STATEMENT OF THE CASE. There was absolutely no evidence that he was chained by the wrists and ankles to the strut of a bench. It was undisputed that Sosa was placed in a seated position on a bench, with shackles running from his wrists, then down between the two slats of the bench to his ankles, to prevent him from getting up and banging on the cell door. R.106 P. Sosa at 2/28/96 TR 62; R.106 G.S. Colvin at 2/28/96 TR 146-149.

Sergeant Brett O'Loughlin was not involved in the decision to place Sosa in shackles at 9:00 p.m. because he worked a later shift and came on duty at 11:00 p.m. R.106 O'Loughlin at 2/28/96 TR 184. O'Loughlin's only role was observing him in shackles after he came on duty, removing him from the shackles at 1:15 a.m., and directing officers to shower him and take his clothes to the laundry. R.106 O'Loughlin at 2/28/96 TR 221 to 225.

Over the objection of Respondent made prior to and during trial, Petitioner was permitted to question Sgts. Colvin and O'Loughlin about the contents of their personnel files and to introduce disciplinary actions as exhibits.[4]

---

[4] Respondents disagree with Petitioner's statement on page 6 of his STATEMENT OF THE CASE that there was any evidence that Sgt. Colvin was cited for failing to control his temper.

Prior to the September 1, 1994 incident, Sergeant O'Loughlin while an officer had received three disciplinary actions for violations of department policies. On February 4, 1991, O'Loughlin was issued a one-day suspension for an inmate incident. R.109 Defendant/Appellants Notice of Filing of Trial Exhibits 8, 12, 13, 14, 14(a). Extraordinary Incident Reports completed by officers in connection with the incident indicated that O'Loughlin observed an inmate engaging in horseplay with an officer, and believing the incident to be serious, intervened and grabbed the inmate around the neck in what appeared to be a chokehold. (*Id.*). A disciplinary hearing resulted in the issuance of discipline. O'Loughlin grieved the decision and was not required to serve the suspension. R.106 B. O'Loughlin at 2/28/96 TR 196 to 201. In February 1992, O'Loughlin was given a written reprimand for spraying mace under a door to a cell holding a large number of inmates. R.106 B. O'Loughlin at 2/28/96 TR 202 to 204. The inmates had become unruly and were trying to pull the observation camera off the wall. R.106 B. O'Loughlin at 2/28/96 TR 219 to 220. Finally, on July 9, 1992, approximately two years prior to Sosa's incarceration, O'Loughlin was given a letter of documentation/counseling for transporting 21 inmates in a van designed to carry a maximum of 13 inmates, between two jail facilities located approximately three miles apart. R.109 Defendants/Appellants' Notice of Filing of Trial Exhibits, Exhibit 17. This letter stated that due to the heat, the number of inmates to be moved, and the area of traffic, the action was negligent on the part of O'Loughlin. (*Id.*). O'Loughlin was advised that any similar actions involving the transportation of inmates could result in severe disciplinary action. (*Id.*).[5]

---

[5] On January 24, 1995, after the date of the September 1, 1994 incident involving Sosa, O'Loughlin placed tape over the mouth

(Continued on next page)

The department director testified Department policies were strictly enforced. R.106 O. Payne at 2/29/96 TR 2-258 to 2-662. Levels of action that could be taken by the Department were a letter of instruction, a written warning, verbal warning, suspension and termination. R.106 O. Payne at 2/29/96 TR 2-283 to 2-292. One purpose of discipline is to correct a person's behavior, and promoting an individual who has been disciplined in the past is not necessarily inconsistent because it depends on the nature of the prior disciplinary action. *Id.*

The collective bargaining agreement covered only corrections officers and sergeants and did not apply to officers with higher ranks. The nine months limitation applied to discipline issued for any type of infraction of department policies. There was no evidence that O'Loughlin was promoted solely because of the promotion policy.

Relying upon *Board of County Commissioners of Bryan County, Oklahoma* v. *Brown*, 520 U.S. ____, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997), a panel of the Sixth Circuit reversed the Judgment against the County and Department. Petitioner's petition for rehearing with suggestion for rehearing en banc was denied.

(Continued from preceding page)

of an inmate who was spitting at him instead of using a mask and was given a verbal warning the same day. R.109 Defendants/Appellants' Notice of Filing of Trial Exhibits, Exhibit 17. In addition to objecting to the introduction of any of the personnel records, Defendants argued this later discipline should not be introduced. R.106 Motion in Limine at 2/28/96 TR 5-8.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S RELIANCE UPON *BROWN* DOES NOT RESULT IN A DECISION CREATING A MUNICIPAL LIABILITY STANDARD IN CONFLICT WITH THIS COURT'S DECISIONS IN *MONELL, TUTTLE, CANTON,* AND *BROWN.*

The Sixth Circuit was correct in applying this Court's decision in *Brown*. The Sixth Circuit's reliance upon *Brown* did not create a standard of municipal liability in direct conflict with previous decisions of this Court, nor did the Sixth Circuit incorrectly analyze the *Brown* decision.

Although the issue in *Brown* concerned a single decision by a final policymaker, the Brown decision did not establish greater or different rigorous standards of proof than that required for other theories of municipal liability. *Brown* applied the standards and principles of culpability and causation already established by this Court in *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), *Oklahoma City v. Tuttle,* 471 U.S. 808, 105 S.Ct. 2427, 471 U.S. 808 (1985), and *Monell v. New York Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *Brown* reaffirmed the principles set forth in these earlier decisions that municipal liability requires more than proof of municipal conduct and proof of a plaintiff's unconstitutional injury. A plaintiff must prove the municipal conduct was taken with the requisite degree of culpability and must further establish a direct causal link between the unconstitutional "policy" or "custom" and the unconstitutional injury.

A. The Standards and Principles of Municipal Liability as Developed in the *Monell, Tuttle,* and *Canton* Decisions and Applied in *Brown.*

Before municipal liability can be imposed in a 42 U.S.C. §1983 action, a plaintiff is required to identify and prove a

"policy" or "custom" which caused his particular constitutional injury. *Monell, Tuttle, Canton, Brown.* A municipal "policy" is a formally approved ordinance, regulation, or decision of a municipal body or a decision by an official "whose edicts or acts may fairly be said to represent official policy." *Monell* at 690-691, 694. A municipal "custom" includes those customs or practices which, although not formally approved, are so widespread, permanent and well-settled so as to have the force of law. *Monell*, at 690-691.

> [T]he notion of "law" must include "deeply embedded traditional ways of carrying out state policy". . . It must reflect a course of action deliberately chosen from among various alternatives. . . In short, a "custom" is a "legal institution" not memorialized by written law. [Citations omitted].

Doe v. Clairborne County, Tennessee, 103 F.3d 495, 507-8 (6th Cir. 1996).

In addition to requiring proof of a municipal policy or custom, *Monell* requires proof that the policy or custom *caused* the constitutional violation so that the policy or custom is in essence the "moving force" behind the constitutional violation. 436 U.S. at 694. In *Monell*, the maternity leave policy was clearly a municipal policy and the policy was unconstitutional. Therefore, once the *Monell* plaintiffs established that the policy was applied, the direct causal link was established. *Tuttle, Canton, and Brown* make clear, however, that not every policy decision or custom is a municipal "policy" or "custom" within the meaning of *Monell*, and a plaintiff must establish by evidence fault and causation — an unconstitutional policy or custom directly linked to the constitutional violation.

In *Tuttle* (Opinion of Rehnquist, J.), a police officer shot a person who did not obey orders to stop. The plaintiff's theory of liability was that the city's policy of supervision and training resulted in inadequate training and caused the constitutional violation. A jury was allowed to infer an

unconstitutional municipal policy of inadequate training and supervision from the evidence of the shooting. The *Tuttle* opinion stated liability cannot be imposed against a municipality on the basis of a single incident if the policy at issue is not itself unconstitutional. 471 U.S. at 822-824. Because "policy" implies a "course of action consciously chosen from among various alternatives," there must be evidence that a municipality deliberately chose to have a policy or make a decision which was constitutionally inadequate. *Id.* In addition, a plaintiff must establish an "affirmative link" between this municipal policy and the constitutional violation. *Id.* An affirmative link is not established by evidence the unconstitutional municipal policy "might lead to" a constitutional violation. *Id.*, n. 8. *Tuttle* emphasized the *Monell* requirements are rigorous, and stated a single incident could not satisfy this fault and causation requirement. *Id.*

In *Canton*, an arrestee exhibited symptoms of an emotional illness while in police custody and no medical care was rendered. The plaintiff asserted municipal liability based on the failure of the city to provide training, other than first-aid, to enable staff to determine when to summon medical care. The Court held that municipal liability can be imposed for failure to train only where the inadequacy or inaction evidences a "deliberate indifference to the rights of person with whom the police came into contact." 489 U.S. at 388. Further, the Court stated that a plaintiff cannot establish a *Monell* policy merely by producing evidence that a training program is inadequate. The plaintiff must establish that the inadequacy "can justifiably be said to represent" municipal policy because "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need." *Id.* at 389-390. Moreover, a plaintiff must establish that the

deficiency is closely related to the ultimate injury. *Id.* at 391. Reasoning from *Monell* and *Tuttle*, the Court stated that this standard satisfied the *Monell* requirement of fault and causation, because only where a policy represents a "deliberate choice to follow a course of action from among various alternatives" and is the "moving force" behind a constitutional violation can liability be imposed. *Id.* Therefore, that a particular officer may be unsatisfactorily trained, or that more or better training could have been provided, is insufficient to impose liability. *Id.* at 390-391. In a separate opinion concurring in part and dissenting in part, Justice O'Connor stated that the deliberate indifference standard properly required evidence giving notice to a municipality of a need for change so that the failure to act is in essence a decision to violate the Constitution. *Id.* at 395. Justice O'Connor also stated that an obvious need for training could be established by evidence that policymakers "acquiesced in a pattern of constitutional violations involving the exercise of police discretion" closely related to the injury at issue, or established by showing a municipality failed to train "concerning a clear constitutional duty implicated in recurring situations that a particular employee is certain to face." *Id.* at 396-397.

B. The *Brown* Decision

In *Brown*, the issue was whether a single, not unconstitutional, decision by a policymaker governing one employee could nevertheless amount to municipal policy — a deliberate, conscious choice to violate the Constitution — in the absence of evidence of a pattern of past constitutional violations that could be directly linked to the plaintiff's injury. In addressing this issue, the Court first stated that its decision in *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) does not mean that a plaintiff can establish municipal liability by proof of municipal action and proof of his unconstitutional injury.

The Court again emphasized that *Monell* requires proof of a municipal policy or custom which was the "moving force" behind the constitutional violation.

Then, relying upon *Canton, Tuttle,* and *Monell,* the Court stated that if a decision is not itself unconstitutional, rigorous standards of culpability apply and a plaintiff is required to establish that the decision was taken with deliberate indifference to Constitutional rights. Further, because of that standard's requirement of a municipality's "failure to act in the face of an obvious need," evidence of a pattern of violations over time with respect to multiple employees puts the municipality on notice of the obvious need to make a change. The Court stated that, even though *Canton* left open the possibility of liability based on failure to train without evidence of a pattern of violations, a plaintiff is still required to "demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." 117 S.Ct. at 1392. Recognizing that predicting the consequences of a hiring decision is difficult and a decision to hire after inadequate scrutiny may create only a generalized risk, the Court held that fault and causation are established only where a scrutiny would lead to a conclusion that the "plainly obvious consequence" of the decision to hire that particular officer was that the officer would inflict the "particular" injury suffered by a plaintiff. *Id.* at 1392-1394.

C. Application of the Standard of Municipal Liability Set Forth in *Monell, Tuttle, Canton,* and *Brown* to this Case.

The Sixth Circuit found that Petitioner never established by evidence an unconstitutional municipal policy or custom which was the moving force behind the unconstitutional injury. As is clearly established in the *Monell, Tuttle, Canton,* and *Brown* decisions, proof of constitutional mu-

nicipal action in the face of proof of an unconstitutional injury is insufficient to establish municipal liability.

First, Petitioner did not and could not prove the existence of a Jefferson County policy stating that officers would not be disciplined for the unconstitutional use of inmate restraints or for the unconstitutional use of excessive force. Further, evidence that one officer received three disciplinary actions for violations of department policies in his handling of inmates does not amount to a policy evidencing a deliberate choice of failing to discipline for the unconstitutional use of force against inmates. This is especially true where the prior instances of discipline bear no resemblance to Petitioner's allegations. Finally, Petitioner produced no evidence that the disciplinary actions taken had been inadequate. The actions taken were evidence of a policy of Jefferson County to discipline for violations of department policies.

Second, the promotion "policy" as established through the testimony of the acting director of the department was not an unconstitutional policy. The policy was applied to any type of departmental infraction, applied only to officers and sergeants, and was accompanied by the department's disciplinary policy allowing discipline up to termination of employment. In the absence of evidence of a pattern of unconstitutional injuries similar in nature to those suffered by Sosa, there could be no competent evidence the County was deliberately indifferent to an "obvious need for change" or that there was a direct causal link between this policy and the injuries.

In relying upon *Brown*, the Sixth Circuit recognized Petitioner in this case did not present evidence of a pattern pointing to a county policy or custom demonstrating a conscious choice of failing to discipline officers for the unconstitutional use of force or of placing officers who would use unconstitutionally excessive force into positions of au-

thority. Therefore, the Sixth Circuit correctly applied the *Brown* decision to determine the only possible basis for municipal liability given the evidence at trial — whether the "plainly obvious consequence" of the single decision to promote officer O'Loughlin to sergeant was that this particular officer would inflict this "particular injury" suffered by "this particular plaintiff."

The Sixth Circuit properly analyzed the record of the evidence presented, and determined Petitioner presented insufficient evidence of municipal culpability and direct causal link.

II. THE ISSUANCE OF A WRIT OF CERTIORARI MERELY TO REEXAMINE THE DOCTRINE OF RESPONDEAT SUPERIOR IS NOT APPROPRIATE IN THIS CASE.

Because the Sixth Circuit did not reach a decision in direct conflict with precedent of this Court, and the Sixth Circuit correctly analyzed the *Brown* decision, the issuance of a writ of certiorari to reexamine whether the doctrine of *respondeat superior* should be applied to municipalities is not appropriate. Further, Petitioner did not raise this argument before the Sixth Circuit. Finally, although Petitioner appears to suggest that Kentucky's indemnification statute moots the issue of *respondeat superior,* the Kentucky Supreme Court recently held that sovereign immunity is absolute, in spite of the language contained in Ky. Rev. Stat. Ann. §65.2005. *Franklin County v. Malone, Ky.*, 957 S.W.2d 195, 204 (1997).

CONCLUSION

For the foregoing reasons, Respondents request this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

SUZANNE D. CORDERY
Assistant Jefferson County Attorney
Jefferson County Department of Corrections
730 W. Main Street, Suite 300
Louisville, Kentucky 40202
Telephone: (502) 574-2167
Fascimile: (502) 574-2184
Counsel of Record